JD–81–01
Allston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PEPSI BOTTLING GROUP, INC.

and Case No. 1–CA–38036

NEW ENGLAND JOINT BOARD,
R.W.D.S.U., AFL-CIO,
LOCAL UNION NO. 513

Michael Fitzsimmons, Esq.,
for the General Counsel.
Christina D. Duddy, Esq.,
of Boston, Massachusetts,
for the Charging Party.
Richard R. Boisseau, Esq.,
of Atlanta, Georgia,
for the Respondent.

DECISION

Statement of the Case

RICHARD H. BEDDOW, Administrative Law Judge. This matter was heard in Boston, Massachusetts on April 10, 2001. Subsequent to an extension in the filing date. Briefs were filed by the General Counsel and the Respondent (the Charging Party by letter dated May 22, 2001, adopted the brief filed by the General Counsel). The proceeding is based upon a charge filed March 31, 2000[1] by New England Joint Board R.W.P.S.U., AFL-CIO, Local Union No. 513. The Regional Director's complaint dated November 27, 2000, alleges that Respondent Pepsi Bottling Group, Inc., violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to apply the Matching Contribution Provision of its 401(k) Plan Provision of its Flexible Benefits Plan to the Charging Party's Allston and Cranston bargaining units.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged in the production, distribution and sale of packaged beverages at Allston, Massachusetts and Cranston, Rhode Island and it annually purchases and receives

[1] All following dates will be in 1999 unless otherwise indicated.

goods and materials valued in excess of $50,000 directly from points outside Massachusetts and Rhode Island. It admits that it is an employer engaged in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act and it also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

Prior to April 1, 1999, the entity that is now Pepsi Bottling Group, Inc., (PBG) existed as The Pepsi-Cola Company, which was a division of PepsiCo, Inc. As a division of PepsiCo, the Pepsi-Cola Company provided certain of its employees with benefits under various PepsiCo benefit plans. Among these benefits was the PepsiCo Flexible Benefits Plan (also known as "Flex" or "Benefits Plus"), which was a cafeteria-style plan that allowed employees to chose from among different options of insurance benefits to suit their particular needs.

The PepsiCo Flexible Benefits Plan, 401(k) Plan (as well as a stock option plan), were described for employees in a unified summary plan description called the Benefits Book. The 1999 Benefits Book for The Pepsi-Cola Company indicated that unionized employees were eligible for participation in the 401(k) Plan if they were covered by a collective bargaining agreement that provided for participation in that benefit but it has no Company-match provision calling for employer contributions to employees' 401(k) accounts.

Since at least 1995, the Union has represented employees in the Cranston Unit and the Allston Unit. Similar but separate collective bargaining agreements (the "1995 Cranston Contract" and the "1995 Allston Contract") were in effect at each facility from 1995 until spring 1999. The Allston agreement covers a unit of approximately 60 warehousemen, mechanics, drivers, and helpers employed at the Allston facility and is in effect from June 1, 1999 to May 31, 2002. This agreement follows an agreement that was effective from June 1, 1995 to May 31, 1999. The Cranston agreement covers a unit of approximately 140 production workers, warehouse workers, mechanics, and drivers employed at the Cranston facility and is in effect from May 1, 1999 to April 30, 2003. This agreement follows an agreement that was effective from May 1, 1995 to August 30, 1999.

The 1995 Allston agreement incorporated the Respondent's Flexible Benefits Plan as follows:

> Effective January 1, 1996, all eligible employees shall be covered under the Company's Flexible Benefits Plan, as described during negotiations.

The 1995 Cranston agreement also incorporated the Benefits Plan as follows:

> Effective January 1, 1996, the Company shall implement The Flexible Benefits Plan as described in negotiations, including the 401(k) plan.

The Union and Respondent entered into the existing agreement for the Cranston Unit on May 1, 1999. The reference to the inclusion of the Benefit Plan was unchanged from the preceding agreement. The Union and Respondent entered into the existing agreement for the Allston Unit, dated June 1, 1995, also reference to the inclusion of the Benefit Plan and was unchanged from the preceding agreement.

The January 1, 1999 Benefits Book distributed to the Allston and Cranston unit employees is approximately 200 pages in length and covers health care, life and accident insurance, disability protection, and future financial security, including Respondent's Save Up

401(k) Savings Plan which provides employees with the opportunity of making tax deferred contributions.

After the spin-off of PBG from PepsiCo, Inc. on April 1, 1999, PBG employees could not participate in the PepsiCo stock option program and in mid May Kevin Cox, the head of human resources at PBG, assigned the development of such a program for PBG to Greg Heaslip, the Director of Benefits.

At subsequent meetings of managers other options were proposed and discussed and at the end of August a senior management team decided to recommend a 401(k) Company match program, pursuant to which the Company's matching contributions would be paid in PBG stock. The recommended program was submitted to the PBG Board of Directors, which approved it in the middle of October.

The 401(k) Company match program was kept confidential until it was approved by the Board of Directors, assertedly so as not to create unfounded expectations among employees. In the second half of October PBG communicated the new benefit to its human resources managers and in December the Respondent announced the 401(k) Company match benefit in a letter to all employees. This letter stated that eligible non union employees would be covered by the 401(k) Company match program beginning in January 2000 and that the Company hoped to be able to extend the benefit to union represented employees in the future "subject to negotiations between PBG and your union."

The Respondent also issued a 2000 edition of the Benefits Book, which did not contain any mention of the 401(k) Company match program, however, the PBG 401(k) Plan was summarized. The 2000 Benefits Book briefly identified which employees were eligible for participation in the PBG 401(k) Plan and stated that "certain union employees" may participate in the Plan.

The notification indicated that, effective January 1, 2000, it was providing a 401(k) matching contribution as part of the Benefit Plan. This new portion of the Benefit Plan provided for a 50 percent matching contribution for up to 4 percent of salary for employees with less than 10 years of service and a 100 percent match for up to 4 percent of salary for those with more than 10 years service. The announcement also stated that employees covered by a collective bargaining agreement, (such as those in the Allston and Cranston units), were not eligible for the benefit unless and until it was specifically agreed to by Respondent in collective bargaining.

Thereafter, the 401(k) Company match program benefit was described in a Prospectus dated March 15, 2000, which described the eligibility of employees for participation in the 401(k) Plan generally and the eligibility of employees for the Company match provision. With respect to participation in the Plan generally, the Prospectus indicated that any employee whose conditions of employment were determined by collective bargaining with a union was eligible to participate in the Plan if inclusion in the Plan had been specifically provided for in the applicable collective bargaining agreement and with respect to eligibility for the Company match benefit, the Prospectus indicated that any employee whose conditions of employment were determined by collective bargaining with a union was eligible for the matching contributions if the employee's right to the Company match had been specifically provided for in the applicable collective bargaining agreement.

The Union then protested this exclusion of its members from the 401(k) matching contribution portion of the Benefits Plan. In March 2000, the Union and Respondent met in an unsuccessful attempt to resolve the matter and the Respondent adhered to its position that it

would not include the unit employees in the 401(k) matching contribution portion as part of the Benefits Plan. Thereafter, in May 2000, the Respondent benefits director sent all employees a letter with enclosures including the 401(k) Plan Prospectus. The Respondent notes that because the PBG 401(k) Plan gave employees the opportunity to make investment decisions, PBG was required by law to prepare a Prospectus and submit it to all employees who were eligible to participate in that Plan.

Discussion

Once a union has been selected to represent an appropriate unit of employees, the employer may not make decisions regarding any term and condition of employment without first notifying the union and providing with the opportunity to bargain and it will be found in violation of Section 8(a)(1) and (5) of the Act by unilaterally implementing changes in a mandatory subject of bargaining such as reducing matching contributions to an employees' 401(k) retirement plan, see *Britt Metal Processing,* 322 NLRB 421 (1996), or eliminating a bonus program or other earning opportunities, see *Frank Leta Honda*, 321 NLRB 482 (1996).

It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. See *NLRB v. C&C Plywood Corp.,* 385 U.S. 421, 430 fn. 15 (1967). Here, the damage to the Union's authority as bargaining representative is highlighted by Benefits Manager Heaslip's May 2000, letter to employees which encouraged employees to read through enclosed materials to learn about the plan while at the same time, precluding unit employees from the chance to participate and telling them (in the prospectus), that it was because it was not included in the Union's bargaining agreement.

Here, the terms and conditions of employment in the existing collective bargaining agreements stated that Allston unit plant employees "shall be covered under the Company's Flexible Benefits Plan, as described during negotiations" and that the Company shall implement the Flexible Benefits Plan as described in negotiation, including the 401(k) plan." The Benefit Plan described in the prior Benefits Book distributed to all employees including an unchanged 401(k) savings plan that did not provide for any matching Company contributions.

Here, I conclude that the language of the applicable 1995 and 1999 agreements means that the Allston and Cranston unit employees would participate in the same flexible benefit plan generally available to other employees. Thus, when the Respondent's unilateral introduced an employer contribution 401(k) plan and refusal to extend this contribution benefit to employees of the Allston and Cranston units, it represented a material change in the terms of the existing contractual agreements. There was no notification to the Union of these changes and there was no offer of an opportunity to bargain over the changes. Otherwise the fact that that changes did not directly diminish any existing Company contribution as in the *Britt* case, supra, does not negate the Respondent's failure to take those steps.

As pointed out by the Respondent, the General Counsel did not present any witnesses to elaborate on the contract phrase "as described during negotiations." Clearly, there is no contention that the past negotiations described any plan Company contributions to a 401(k) plan and any such evidence regarding benefits in general would not be relevant and would not alter the corroborative description of benefits including the Flexible Benefits Plan listed in past annual Benefits Books, which included the relevant employee paid 401(k) plan only. Under these circumstances, the General Counsel is not required to show, as suggested by the Respondent, that the Company was contractually obligated to provide unit employees with a Company match 401(k) benefit plan. The issue here is the unilateral and disparate implementation of benefit

changes to various employees without notice or an opportunity to bargain, see *Garney Morris, Inc.,* 313 NLRB 101 at 122 (1992).

The Respondent also argues that any 401(k) plan is not part of the "Flexible Benefits Plan" referred to in the Allston unit contract. The Respondent's Director of Benefits described the Benefits Books as a combined summary plan description of various benefits. He also described the Flexible Benefits Plan as a cafeteria style benefit which also goes under the name "Benefits Plus," but be asserted that the 401(k) plan was separate from the "Benefits Plus" or "Flex" plan effective April 6, 1999. He agreed, however, that as of April 1999, the Respondent had a single 401(k) program. That program (Respondent's Exhibit No. 2), provides as follows:

> 2.1 Eligibility for Participation
>
> (a) Eligible Employees – The following Employees shall be eligible to participate in the Plan:
>
> (i) Any Employee entitled to enroll in their Employer's Benefits Plus program; or – – –

Also, Respondent's witness Laman (who formerly was a Senior Labor Relations Manager for the company), noted that he participated as either a negotiator or Chief negotiator in the negotiation of both of the applicable agreements, however, the Respondent's counsel failed to ask him about the contract phrase "as described during negotiation." The failure to examine a favorable witness regarding any factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference against Respondent "regarding any such fact," see *Flexsteel Industries, Inc.,* 316 NLRB 745, 758 (1995). Accordingly, I conclude that the inclusion of that phrase in the contract is not shown to raise any relevant ambiguity and I therefore find that the Allston unit employees, by virtue of the contractual language referring to their coverage under the Company's Flexible Benefits Plan and the Cranston unit employees under that language and the specific inclusion of the "401(k) plan," were contractually entitled to be eligible for participation in the existing non employer contributory 401(k) plan.

In summation, I find that an employer who is party to an existing bargaining agreement which provides for eligibility in a 401(k) plan cannot then unilaterally exclude one subclass of its employees (here, its Local Union No. 513 unit employees covered by a collective bargaining agreement), for not having negotiated a revised benefit while, at the same time unilaterally implementing the new benefit for other employees and simultaneously precluding the bargaining representative from negotiating on that issue.

Here, despite the existence of contractual rights to receive benefits which included voluntary participation in a 401(k) plan, the Respondent failed to notify to the Union of its planned changes and it did not offer an opportunity to bargain about them before it unilaterally implemented a new 401(k) plan that excluded unit employees from eligibility. These actions are inconsistent with the Respondent's bargaining obligation and they also have undermined the status of the Union as bargaining representative of unit employees. Accordingly, I find that the Respondent is shown to have failed to bargain in good faith and has violated Section 8(a)(1) and (5) of the Act, as alleged.

IV. Conclusions of Law

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective bargaining representative of appropriate units of employees at the Employer's Allston, Massachusetts and Cranston, Rhode Island facilities.

3. By unilaterally making changes in terms and conditions of employment by changing unit employees' rights to participate in the 401(k) provisions of the Employer's Flexible Benefits Plan without giving the Union notice and the opportunity to bargain about the subject, the Respondent has violated Section 8(a)(1) and (5) of the Act.

V. Remedy

Having found that the Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

Having found that the Respondent failed to notify and bargain with the Union as the employees' 401(k) plan, the Respondent is ordered to bargain in good faith with the Union. In addition, the Respondent is ordered to make whole with interest, unit employees for the lost opportunity to make contributions to the matching 401(k) plan. Any additional amount the Respondent must pay shall be determined in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[2] The Company shall be required to preserve and make available to the Board or its agents, or request, payroll and other records to facilitate the computation of this make whole remedy.

Otherwise , it is not considered necessary that a broad order be issued.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

ORDER

Respondent, Pepsi Bottling Group, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[2] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1997 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.,* 231 NLRB 651 (1977).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing to bargain with the New England Joint Board R.W.D.S.U. AFL-CIO Local Union No. 515 by unilaterally instituting a new benefits plan that excludes unit employees and by failing to give the Union timely notice and an opportunity to bargain about changes in the Employers Flexible Benefits Plan, including changes in its 401(k) plan.

(b) Failing to continue in effect all the terms and conditions of the applicable bargaining agreement by failing and refusing to apply the matching contribution provision of its revised 401(k) plan to employees in the Allston, Massachusetts, and Cranston, Rhode Island units of Local Union No. 515.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Notify and give the Union an opportunity to bargain before unilaterally making any changes in terms and conditions of employment of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All warehousemen, coin and refrigeration mechanics, Fleet mechanics, driver salesmen, utility drivers, and helpers employed at Respondent's Allston facility but excluding all executives, non-working foremen, professional, supervisory, and clerical employees.
>
> All production workers, warehouse workers, maintenance mechanics, fleet mechanics, and transport drivers employed at Respondent's Cranston facility, but excluding all executives, non-working foremen, professional, supervisory, and clerical employees.

(b) Within 14 days from the date of this Order, revoke that portion of its PBG 401(k) Plan which states that employees covered by a collective bargaining agreement are not eligible and, make them eligible on the same basis of non-unit employees retroactively to January 2000.

(c) Make the unit employees whole, with interest, for any losses suffered as a result of the "denial of eligibility to participate in the new 401(k) plan in the manner set forth in the "Remedy" section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Allston, Massachusetts and Cranston, Rhode Island, copies of the attached notice marked "Appendix."[4]

[4] Is this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2001.

_____
Richard H. Beddow, Jr.
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the New England Joint Board R.W.D.S.U. AFL-CIO Local Union No. 515 by unilaterally instituting a new benefits plan that excludes unit employees and by failing to give the Union timely notice and an opportunity to bargain about changes in our Flexible Benefits Plan, including changes in its 401(k) plan.

WE WILL NOT fail to continue in effect all the terms and conditions of the applicable bargaining agreement by failing and refusing to apply the matching contribution provision of our revised 401(k) plan to employees in the Allston, Massachusetts, and Cranston, Rhode Island units of Local Union No. 515.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL give the Union notice and an opportunity to bargain before unilaterally making any changes in terms and conditions of employment of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All warehousemen, coin and refrigeration mechanics, Fleet mechanics, driver salesmen, utility drivers, and helpers employed at our Allston facility but excluding all executives, non-working foremen, professional, supervisory, and clerical employees.
>
> All production workers, warehouse workers, maintenance mechanics, fleet mechanics, and transport drivers employed at our Cranston facility, but excluding all executives, non-working foremen, professional, supervisory, and clerical employees.

WE WILL within 14 days from the date of this Order, revoke that portion of its PBG 401(k) Plan which states that employees covered by a collective bargaining agreement are not eligible and make them eligible on the same basis of non-unit employees retroactively to January 2000.

WE WILL make unit employees whole, with interest, for any losses suffered as a result of the "denial of eligibility to participate in the new 401(k) plan in the manner set forth in the "Remedy" section of the Judge's decision.

PEPSI BOTTLING GROUP, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10 Causeway Street, 6th Floor, Boston, Massachusetts 02222–1072, Telephone 617–565–6701.